No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioners,

vs.

WILLIAM F. HESS ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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Counsel for Petitioners.

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Without attempting to treat categorically of all points raised in the Brief in Opposition—since many are obviously without merit or are irrelevant—this reply is filed in answer to certain of respondents' contentions.

1. *Respondents have shown no authority to speak for the Solicitor General.*—The suggestion (Br. In Opp. 1-2) that the Government does not want a certiorari is for the Government to make. Up to now the Solicitor General has not found it necessary to rely on others to present his

views to this Court. In view of his freedom in that respect (Rule 7(a)), we know of no reason which should now impel the Court to accept unauthorized representations of others on his behalf.

2. *The laws of Congress conclusively establish public policy.*—The contention that *qui tam* suits are opposed to public policy or that the views of the Department of Justice or of the courts are properly to control or in any way limit the plain enactment of the Congress (Br. in-Opp., pp. 2, 6) of course cannot be entertained here in view of the reiterated statements by this Court that the policy or wisdom of Federal legislation and its appropriateness as a remedy for the evils which it seeks to eliminate are matters for Congress alone to determine. They are not matters with which the courts are concerned. *Helvering* v. *Davis*, 301 U. S. 619, 640; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 324; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, 259; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394.

Indeed, R. S. Sec. 5438, read together with the informer sections, has long been recognized as a "useful and necessary statute" (*Ex parte Shaffenburg*, Fed. Cas. No. 12,696 at p. 1146). The soundness of the policy of the statute was recognized in *United States* v. *Griswold*, 24 Fed. 361, 366:

> The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of

personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

There can be no denial that there presently exist the same reasons which were the occasion for the original passage of R. S. sec. 5438. Reports of Congressional investigating committees attest the actuality of the evil and public recognition of the necessity of immediate steps for its suppression. Clearly, it is not for respondents to argue that the propriety of enforcement of existing law is to be weighed against other alleged counter-balancing considerations. And, as this Court has held, neither is it for the courts. Congress has spoken. Short of constitutional inhibitions, it is neither for the judiciary nor the executive to emasculate this law either by construction or arbitrary refusal to give effect to all its provisions.

3. *The evidence plainly established a cause of action under R. S. sec. 5438.*—Under Point II in their brief Respondents advance a number of other contentions equally fallacious or inapplicable.

(a) *Public policy.*—The asserted rule that "informers are not favored" has no application here. In the first place, no construction of an informer statute is involved. The decision below was the result of a refusal to give any effect to the plain provisions of a statute (R. S. sec. 5438) which makes no reference whatsoever to *qui tam* proceedings. Manifestly, the section cannot be arbitrarily construed to mean one thing when the United States sues under it and to mean something else when another brings suit under it in behalf of the United States.

(b) *Statutory construction.*—The rule suggested by respondents (Tr. in Opp., p. 7), that penal statutes are to

be strictly construed, has long been disavowed by this Court. In *United States* v. *Bowman*, 260 U. S. 94, it was held (p. 102):

> "Penal provisions like all others are to be fairly construed according to the legislative intent as expressed in the enactment." They are not to be strained either way.

More recently, it was held (*United States* v. *Raynor*, 302 U. S. 540, 552):

> No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope —nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress.

This Court recognizes that statutes, such as this, to safeguard the fisc and to reimburse the government for the heavy expense of investigation plus the loss from the fraud are clearly remedial in character. *Helvering* v. *Mitchell*, 303 U. S. 391, 401. As such, of course, they should be liberally construed to achieve their purpose. *Stewart* v. *Kahn*, 11 Wall. 493, 504; *Farmers', etc., Nat. Bank* v. *Dearing*, 91 U. S. 29, 35; *Miller* v. *Robertson*, 266 U. S. 243, 248.

In the instant case, petitioner asks no more than that the action of the court below in arbitrarily nullifying the second and third clauses of the statute be corrected.

(c) *Application of statute.*—Respondents resort to the contention, successfully made in the court below, that R. S. sec. 5438 applies only where the defendant, either alone or acting jointly with others, has "made or presented" a false claim against the United States "based upon the Government's own liability to the claimant" (Br. in opp., pp. 7-15). Insofar as this broad statement embraces more

than the first clause of the statute, it is obviously captious in view of the plain language of the law. *Edgington* v. *United States*, 164 U. S. 361, 362-363. That the defendant need not be the person who makes or presents the claim is apparent from the plain language of the first clause of the section:

> Every person who makes or *causes to be made*, or presents or *causes to be presented*, for payment or approval * * * any claim * * *

and of the second clause:

> or who, for the purpose of obtaining or *aiding to obtain* the payment or approval of such claim * * * (Emphasis supplied.)

The exact contention of respondents was early made and overruled in *United States* v. *Hull*, 14 Fed. 324. The court there said (p. 326):

> The use of this language clearly implies that the statute is intended to cover a case where an attorney, agent, officer, or other person undertakes to get a claim which is false and fraudulent allowed in his own behalf or in behalf of any other party; otherwise the language "aiding to obtain" would have no meaning whatever.

The cases cited by respondent are manifestly inapposite on this point and the language quoted from them, read in context, make it clear that the courts in both the *Mercur Corp. case* (83 F. 2d 178) and *Olson* v. *Mellon* (4 F. Supp. 947) were dealing with situations in which no "claim" had been made by anyone.

With the basic premise falls the entire argument (Br. in Opp. 7-15) upon which the respondents have principally relied—the loophole that they made no claim directly against the United States.

While it might well be argued, contrary to respondents' contention (Br. in Opp., p. 13), that under principles of

agency one of these defendants, had there been no fraud and had he been unpaid, might have recovered against the United States on principles of agency for a disclosed principal, it is unnecessary to discuss that question since this is not a contract action based upon privity, but is in tort for deceit.

(d) *The I-23 estimates of each contractor were fraudulent claims.*—Under the heading "No falsity in any claim" (Br. in Opp. 15), respondents make their basic argument that "there was no falsification or fraud in anything which occurred after the contracts were executed." It seems plain that, in reason, a wrongdoer may not thus insulate the demands by which he obtains the fruits of his fraud from the initial misrepresentations by which he obtained the contract on which the demands are based. In the first place, in *Mandel* v. *Cooper Corp.*, 42 F. Supp. 317, cited by respondent, it is specifically noted that the instant case is distinguishable on its facts. The court in that case was at some pains to point out that (p. 318) "It clearly appears from the affidavits of the defendants that the defendants made no express representations that the prior bids were not the result of any agreement among bidders."

In the case at bar such representations were plainly made. The distinction is all important. It is plain that fraud and misrepresentation may induce not merely the formation of a contract but also some performance under it. 2 Restatement, Contracts, sec. 476, *com. a.* Here, even if it be assumed that the contract itself was a genuine contract fixing the amounts which could subsequently be claimed by respondents on their periodic estimates, it is nevertheless clear that—because the original contract had been obtained by fraud involving an affirmative representation—the periodic claims based on such contract were

also fraudulent claims within the meaning of the statute. *United States* v. *Coggin*, 3 Fed. 492, 495. Certainly this is true where, as here, the fraud in inducing the contract was accompanied by affirmative statements and at the time each periodic claim for payment was made the contractor remained silent knowing that the municipality and the approving Government officer were relying in part on that original affirmative representation of non-collusion. Each demand of the contractor in his Form I-23 estimate, particularly in the silence of the contractor, amounted to a continuing representation accompanying each claim of the Form I-23 monthly periodical estimates (See Petition, pp. 8-9). *Hills Sav. Bank* v. *Cress*, 205 Iowa 306; *First State Sav. Bank* v *Dake*, 250 Mich. 525; *Brown* v. *Lobdell F. & Co.*, 51 Ill. App. 574. It follows that each claim, itself involving this continuing fraudulent representation, was fraudulent in character within the meaning of clause 1 of R. S. sec. 5438.

The applicable rule is set forth in 3 Restatement, Torts, sec. 535:

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepresentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction.

(e) *Both the I-23 claims of the contractors and their non-collusion certificates contained false and fraudulent entries and were made for the purpose of aiding to obtain the approval and payment of the claims of the municipalities against the United States.*—The respondents would here limit petitioners to the single question of whether

a case was proved under the first clause of R. S. sec. 5438 (Br. in Opp. pp. 17-18).

But petitioner in his complaint relied on all of the first three clauses of the statute, alleging conspiracy under the third clause and use of false and fraudulent certificates under the second clause (R. 14) and those issues were submitted to the jury (R. 133-134, 137-138). The respondents, in overturning the judgment of the district court, obtained the ruling of the circuit court of appeals that:

> The statutory language here important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or any department or officer thereof".

Duignan v. *United States*, 274 U. S. 195, 200, cited by respondent, merely held:

> It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

Since the record here shows that the circuit court of appeals in reversing the trial court's judgment necessarily and specifically held that the language of the second and third clauses was to be disregarded, it clearly passed upon the question of the effect of the second and third clauses of the statute as a matter of law.[1] Therefore, the error of that court on that question, properly specified as error (Pet. 11-12), is clearly here for review.

Recognizing that the judgment of the district court may be sustained under the second clause of the statute if either

[1] It may be noted that the court clearly did not pass on the question of the sufficiency of the evidence to sustain the verdict under the second and third clauses of the statute. It was without power to do so, for no such point was stated in the "Points to Be Raised on Appeal" (R. 399) and much of the evidence was omitted in the Designation of Record on Appeal (R. 392-395). *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 390.

(1) the Form I-23 monthly estimates or claims of the contractors were false or fraudulent or (2) if the certificates of non-collusion were for the purpose of aiding to obtain the payment of claim against the United States, the respondents attack both grounds (Brief in Opp. pp. 18-22) as follows:

(1) It is contended that the periodic estimates contained no "fraudulent or fictitious entry". Respondents point to Ex. 245, R. 202-207, as showing no such entries. Examination of that exhibit shows that it states as "true and correct statement of the contract account" certain amounts alleged to have been "earned". And it contains the further statement that (R. 205):

> All work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents.

But made part of each such contract was the invitation for bids and the bid proposal including certificate of non-collusion (R. 217, 225-226). The certificate of non-collusion was thus obviously part of the contract documents.

It seems plain that, where the contract documents included the certificate of non-collusion and where as a direct result of breach of the certificate of non-collusion the rates at which work was charged were higher than they would otherwise have been, the statement in each I-23 estimate that work had been performed "in full accord with the terms and conditions of the contract documents" could not be other than false and fraudulent and was necessarily a part of the continuing fraud.

(2) Respondents assert (Br. in Opp. 19-20) that there is absolutely no evidence that the certificates of non-collusion were included in the Government audit or that they were relied upon by the administrative officers of the Gov-

ernment in acting upon the municipalities' requisitions of federal funds. The Regulations of the Federal Emergency Administrator of Public Works provided that the requisitions of the municipalities (that is, the claims which respondents purposed to aid in obtaining), should be forwarded to the Executive Officer at Washington, where they "will be subjected to a final review and to a check against all of the pertinent project records" (44 C. F. R. 230.24, see Pet. App'x. pp. 30-31). As pointed out in the Petition (p. 21, note) respondents are charged with knowledge of this regulation. The form of finance agreement used in all cases specifically provided that five copies of all executed contract documents be furnished to the PWA before any work was done thereunder (R. 165). It could not be seriously thought or contended that these construction contracts, most of which embodied the certificate of noncollusion of the contractor, would be other than highly pertinent in determining the propriety of payments to the municipalities on their intermediate and final requisitions to cover the cost of construction.

Clearly beside the point is respondents' further argument (Br. in Opp., p. 21) that the suspension of payment instanced by petitioner (Pet., p. 10) would have been made in any event. It is obvious that, regardless of the ultimate effect in a particular case, these false certificates must be regarded as manifesting a purpose on the part of respondents that they should have their obvious consequence, *i. e.*, aiding to obtain the payment or approval of the claim of the municipality against the United States.

(f) *The requisitions of the municipalities were fraudulent claims against the United States within the meaning of the statute.*—Respondents make the further argument that the claims or requisitions filed by the municipalities with the United States were not "fraudulent claims" within the

meaning of the statute because each was in strict accord with the pre-existing Finance Agreement of each municipality with the United States (Br. in Opp., p. 22). In essence, this merely amounts to saying that the municipality was innocent of any fraudulent intent.

But it is established that a defendant who makes a fraudulent representation to another intending or expecting that it will be exhibited or repeated to a third party for the purpose of deceiving him is liable in tort to the person so deceived. *David* v. *Louisville Trust Co.*, 181 Fed. 10, 14-15; *Jamestown Iron & Metal Co.* v. *Knofsky*, 291 Pa. 60. In the Restatement, Torts, Vol. 3, Sec. 533, the rule is stated:

> The maker of a fraudulent misrepresentation in a business transaction is subject to liability to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person for the purpose of having him repeat its terms or communicate its substance to the other in order to influence his conduct in a particular transaction or type of transaction.
>
> *Comment a. Inducing action between third persons.* The rule stated in this Section is applicable not only where the maker's purpose is to influence by its repetition the conduct of another in a transaction with the maker but also where his purpose is to influence the other's conduct in a transaction with a third person.

Respondents, in effect, contend that the fraudulent representations made by them in their Form I-23 claims and in their certificates of non-collusion, forming part of the supporting fact basis upon which the demands of the municipalities were paid by the United States, were nevertheless so far insulated by the interposition of the municipality as to prevent the claim of the municipality from being a fraudulent claim against the United States within the meaning of the second clause of R. S., Sec. 5438. They

found this contention on the assertion that the claims of the municipalities "contained no false, fictitious or fraudulent statement" (Br. in Opp., p. 22).

This contention ignores the realities of the situation and the plain intent of the law. As here, claims against the Government invariably and necessarily consist of statements of fact in connection with demands for payment; and it would be a perversion of language to say that the fraudulent I-23 estimates which support the demands of the municipalities and the fraudulent non-collusion certificates which with them formed part of the basis upon which those demands were paid by the United States do not constitute the demands of the municipalities a false claim within the meaning of the statute. *Evans* v. *United States*, 11 F. (2d) 37, 39. The character of the claims of the municipalities—that is to say, whether true, genuine, and honest, or false, fictitious and fraudulent—must be determined in view of all of the facts and circumstances attending them. *Dimmick* v. *United States*, 116 Fed. 825, 828; cf. *United States* v. *Downey*, 257 Fed. 366, 368. The fraudulent representations of the respondents, as they come to the United States in support of and to some degree as part of the municipalities' demands, are still actively fraudulent. Moreover, to construe the second clause of the statute as covering these facts is merely to read it as adopting the principles recognized at common law.[2]

It is, therefore, submitted that, within the fair intendment of the statute, the claims of the municipalities against the United States were fraudulent claims so far as these defendants are concerned.

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[2] In 3 Restatement, Torts, sec. 533, *com. d*, with respect to representations to rating companies, it is pointed out:

> The fact that the rating company does not communicate the figures misstated by the maker of the misrepresentations is immaterial. It is enough that their substance is summarized with reasonable accuracy or that the rating given expresses the effect of the misstatements made.

(g) *The United States has a statutory cause of action.*—It is also contended (Br. in Opp., p. 23) that the right of action here is confined to the local municipalities, because a donor has no cause of action against a third party who defrauds a donee. The simple answer is that, even if the contractual relationship could be regarded as creating merely a donor-donee relationship, which we deny, this was not a completed gift and it is well-established that even under common law principles the action of deceit for fraud is not based on contractual relation and privity of the parties is not essential. Furthermore, since the cause of action here is purely statutory, the sole question is whether the facts bring the case within its operation.

4. *Imposition of a civil penalty after conviction does not constitute double jeopardy.*—The contention that respondents are being punished twice is without merit. In *Helvering* v. *Mitchell*, 303 U. S. 391, this Court overruled a similar contention based on a prior acquittal of a criminal charge of wilful attempt to evade or defeat the income tax. Upholding a civil action, under section 293(b) of the 1928 Revenue Act, to recover a 50 per cent penalty because of a deficiency due to fraud with intent to evade the tax, the Court said:

> That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. (P. 397.)
>
> Congress may impose both a criminal and a civil sanction in respect to the same act or omission: for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. (P. 399.)
>
> Remedial sanctions may be of varying types • • • Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil

> proceedings. * * * In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. (Pp. 399-400.)
>
> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. In *Stockwell* v. *United States*, 13 Wall. 531, 547, 551, the Court said of a provision which added double the value of the goods: "It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed or purchased, instead of their single value." (P. 401.)
>
> That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal sanction. (P. 402.)

That is the situation in the instant proceeding. Congress provided for two separate proceedings for the offenses alleged in the complaint. The one was purely a criminal sanction providing fine and imprisonment, and the other was a civil sanction providing for the recovery of damages and forfeiture.

3. *Consent of Commissioner or Attorney General is unnecessary.*—The final point made by respondents, that this suit required the consent or authorization of the Commissioner of Internal Revenue and the Attorney General is clearly without merit as is amply shown in the opinion of the circuit court of appeals, and it is unnecessary to add to the complete answer there made (R. 479-483).

CONCLUSION.

This cause involves the naked legal question of the liability of parties to the United States for fraudulent acts in connection with public contracts. Few subjects of the law are presently more important, and this subject is destined to become of eve greater importance in the future. Not only is the subject of importance as a matter of law, but it is one of importance in connection with public policy generally and as an incident to national defense. In these circumstances, few people will lightly condone judicial construction—such as that indulged by the court below—which emasculates a statute under circumstances and at a time when that very statute is intended to be applicable to the full. It is therefore respectfully submitted that the writ of certiorari should issue as prayed in the petition.

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